

BOARD OF APPEALS CASE NO. 4795

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BEFORE THE

APPLICANT: Kraus Joint Venture

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ZONING HEARING EXAMINER

REQUEST: Appeal of Zoning Administrator's decision regarding permitted uses of the subject parcel; 1233 Joppa Farm Road, Joppa

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 3/18/98 & 3/25/98

HEARING DATE: December 16, 1998

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Record: 3/20/98 & 3/27/98

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Kraus Joint Venture, is appealing an administrative decision in a letter dated January 16, 1998, pursuant to Section 267-7(E) of the Harford County Code.

The subject property is located at 1233 Joppa Farm Road in the First Election District. The parcel is identified as Parcel No. 271, in Grid 3-E, on Tax Map 64. The parcel contains 10.02 acres, more or less, all of which is zoned R1. The parcel is owned by Ruth Kraus, Michael Kraus, Leonard Kraus and Barry Kraus.

The first witness to testify was Leonard Kraus, one of the owners of Kraus Joint Venture. Mr. Kraus said that the property was purchased at public auction in December, 1989, and that he had not checked with the Harford County Department of Planning and Zoning to determine what uses were allowed on the property prior to its purchase. Mr. Kraus said that he does not reside on the property, but as a result of driving past the property, he believed that he was familiar with its historic uses. He said he recalled construction equipment being located on the property continuously as early as 1948 and he introduced a letter from Donald Conklin, his predecessor in title, indicating that the predecessor in title was in the construction business. Mr. Kraus said that soon after he purchased the property, his brother-in-law began to use the property for his trucking business and that he now rents the house on the property to residential tenants. He said that Dilworth Trucking also uses an area of the property with dimensions of 150 feet by 250 feet to operate a trucking and excavating business.

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On cross examination, Mr. Kraus identified other equipment on the subject property, including a storage container and various machinery which is used by Dilworth Trucking. He was unable to remember when he began receiving rent checks from Dilworth, he does not know where Dilworth's office is located, and he testified that he did not know where the rent checks he now receives originate. Mr. Kraus also indicated that for a couple of years, Superior Concrete used the subject property and he further explained that miscellaneous debris was located on the property when he purchased it in December, 1989. He said that most of the debris was accumulated by prior owners.

Mr. Gerald Scott, who said he has been a resident of Kingsville for approximately 52 years, said he knew the Applicant's predecessor in title and had personal knowledge from driving by it on occasions. He indicated that pans, bulldozers and trucks were located on the property.

Mr. William Ray Duvall, who resides in Aberdeen, appeared and testified that he had personal knowledge of the subject property since at least 1970, having lived close to it at one time and continuing to own and operate a barbershop across from the subject property. Mr. Duvall said that he knew Donald Conklin, the prior owner, and believed that Mr. Conklin had a bulldozer which he used to clear the subject property. He said Mr. Conklin also had dump trucks and carried on a business. He said he did not know what Conklin did with the dump trucks because they were not always on the property.

Mr. Gerald Rasp appeared and testified that for some thirty years he lived across Philadelphia Road from the subject property. He said he remembered a bulldozer being kept in front of the garage, he recalled that Mr. Conklin had another small truck and a small dozer, and he believed there may have been two dump trucks on the property. He described the vehicles as being a Ford single-axel and an International single-axel, but said he did not believe the trucks were operable.

Mr. Patrick O'Keefe, who resides in Hunt Valley, Maryland, testified that he first visited the property in 1955 when he was 14 or 15 years old. Between the years 1955-1960, he remembered trucks and bulldozers parked on the property.

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Mr. Charles Schluter of Kingsville, Maryland, said he is familiar with the subject property and travels along Joppa Farm Road regularly. He said he always saw activity in the garage on the property, because the garage doors were open when he went past and someone was always working inside. He said he believed he observed a backhoe, a low boy and two dump trucks on the property.

Mr. Richard Rutkowski, who also resides in Kingsville, Maryland said he met Mr. Conklin in 1970 and visited the property on occasion. He recalled equipment on the property, including bulldozers, trucks and a backhoe.

Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning, appeared and gave the zoning history of the subject property. He said in 1964 a permit was issued to Donald Conklin to construct a building which was to house a bulldozer, a backhoe and a low boy. Mr. McClune said that any continuing right to use the property were subject to that zoning approval. He said the use of the property for business purposes is not a valid non-conforming use and that the only allowable use for the property is the storage for personal purposes of a backhoe, low boy and bulldozer as set forth in the 1964 Board of Appeals' decision.

Mr. Thomas Harkins, Joppa, Maryland, appeared and testified that he has lived at Alexis Drive since 1979 and has been familiar with the subject property since before that time. Mr. Harkins testified he drives past the subject property daily on his way to and from work at Aberdeen Proving Ground. He said he remembers the use of the property and recalls a bulldozer and single-axel dump truck on the property. He said a concrete mixer was also located on the property and he seldom saw activity on the property. He said he never saw anyone in the shop working on the equipment, he never saw the shop doors open, and he never saw a low boy or backhoe on the property.

Mrs. Raine Harkins, Joppa, Maryland, testified that she grew up in the area and has lived on Alexis Drive since 1979. She recalled a bulldozer, backhoe and a concrete mixer, but cannot recall anything else on the property.

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Mr. Norbert Semenkow, Joppa, Maryland, appeared and testified he is familiar with the subject property and has lived on a adjoining parcel since 1976. He said he recalls an old truck and an old front-end loader which had tracks. He went on to testify that there were two single-axel dump trucks on the property and there were additional old pieces of equipment which never ran and which were parked to the east side of the existing garage.

Mr. Donnelly Hepner, Joppa, Maryland, said he is a 20-year resident of the area and lives next to Mr. Semenkow. Mr. Hepner said his property also joins the subject property and stated that all equipment on the site was inoperable, with the exception of the bulldozer, that it was stored on the southeast side of the garage and was never moved.

Mr. Ocid Jackson, Joppa, Maryland, said he as been in the construction business prior to his retirement and he knew Mr. Conklin very well. Mr. Jackson said that he helped Mr. Conklin move onto the subject property in the 1940's and had been on the property often thereafter. Mr. Jackson lives just north of the subject property on Bulls Lane. Mr. Jackson's personal observations were that the property was never used for business by Mr. Conklin, although Mr. Conklin had a truck, perhaps two dump trucks, and a front-end loader, none of which were operable. Mr. Jackson believes that the vehicles were inoperable for the total time that they existed on the property. Mr. Jackson said that there was a bulldozer which was operable which Mr. Conklin drove around the property, and that he was aware of the use of the property and the equipment and he would have known if there had been other equipment on the property.

Mrs. Catherine Hall, Joppa, Maryland, testified she had never seen activity on the subject property when the property was owned by Mr. Conklin during the 30 years that she had lived at her residence. She never heard noise nor never heard any activity. She said, to her knowledge, no commercial use was made on the subject property when it was owned by Mr. Conklin.

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CONCLUSION:

The Applicant has appealed an administrative decision set forth in a letter dated January 16, 1998, prepared by the Director of Planning and Zoning. The Planning Director's letter, inter alia, gave the following interpretation:

1. That the property of the Applicant located at 1233 Joppa Farm Road does not enjoy the status of a non-conforming use as described by the Applicant.
2. That a resident is allowed to keep on the property three (3) pieces of personal use equipment similar to a backhoe, bulldozer, low-boy trailer approved in Board of Appeals Case No. 970, decided in 1964.
3. The equipment may be used for non-commercial activity on site and for work performed offsite.
4. Any other non-residential use would require Board of Appeals approval.

The Applicant is appealing that decision, pursuant to Section 267-7(E), which provides:

"Any decision of the Zoning Administrator shall be in writing and shall be subject to appeal to the Board by an aggrieved person within twenty (20) days of the date of the decision."

Section 267-20 of the Harford County Code provides:

"Non-conforming buildings, structures or uses may be continued, subject to the following provisions:

- A. No non-conforming use shall be changed to a use not permitted by this Part 1 in the particular district in which the building or structure is located except:
 - (1) If no structural alternations are made, a non-conforming use building may be changed to a similar or more restrictive use of the same or less intensity.
 - (2) Whenever a non-conforming use has been changed to a more restrictive use, such use shall not thereafter revert to a less restrictive use.
 - (3) When authorized by the Board, one non-conforming use may be substituted for another non-conforming use."

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Much of the case law involving the interpretation of a non-conforming use is summarized in McKemy v. Baltimore County, 39 Md. App. 257, 385 A.2d 96 (1978). In applying the Baltimore County statute before it, the Court of Special Appeals held:

“In deciding whether the current activity is within the scope of the non-conforming use, the Board should have considered the following factors:

- (1) To what extent does the current use of these lots reflect the nature and purpose of the non-conforming use;
- (2) Is the current use merely a different manner of utilizing the current non-conforming use or does it constitute a use different in character, nature and kind;
- (3) Does the current use have a substantially different effect on the neighborhood;
- (4) Is the current use a drastic enlargement or an “extension” of the original non-conforming use.”

It was further held in the Court of Appeals of Howard County v. Meyer, 207 Md. 389, 114 A.2d 26 (1955), relied upon by the County Commissioners of Carroll County v. Zent, 86 Md. App. 745, 587 A.2d 1205 (1991):

“The owner of a land may establish a ‘non-conforming’ use if the evidence conclusively establishes that before and after the time of the adoption of the original zoning ordinance, he was using substantially all of his tract of land in a then lawful manner for a use by which a later legislative action became non-permitted”.

In County Commissioners of Carroll County v. Uhler, 78 Md. App. 140, 552 A.2d 942 (1989), in addressing a case somewhat factually similar to the case sub judice, held:

“The party asserting the existence of a non-conforming use has the burden of proving it. Whether that party has met its burden is a matter entrusted to the Board. And, since that decision, as is the decision as to whether to certify a non-conforming use, can be made only after and determining facts, the Board acts in a quasi/judicial capacity in making it. In that capacity the Board acts as a fact finder, accessing the credibility of the witnesses, and determining what inferences to draw from the evidence”.

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In National Institutes of Health Federal Credit Union v. Hawk, 47 Md. App. 189, 422 A.2d 55 (1980), the Court of Special Appeals said:

“Maryland case law permits continuing a non-conforming use; but does not permit the transformation of an approved non-conforming use into a new and different use. The latter constitutes an unlawful extension, even if there is outward change in the appearance of the facility being used.”

Many of the witnesses who testified were less than precise in their recollection of the extent and identity of equipment used. This, of course, is understandable because we are spanning the use of this property for a period of nearly 50 years. At least two sources appear significant in establishing the uses which existed on the subject property in 1957. The first is the testimony of Ocid C. Jackson and the other is the decision of the Board of Appeals in the case decided in 1964.

Mr. Ocid Jackson testified with certainty that he was acquainted with Mr. Conklin and he, in fact, helped Mr. Conklin move onto the property in the 1940's. Mr. Jackson clearly recalled that the property was never used for a business and, according to Mr. Jackson, Mr. Conklin had a dump truck, perhaps two dump trucks, a low-boy, and a front-end loader, none of which ever moved, and a bulldozer.

Mr. Jackson was very certain in his testimony that the vehicles were never operable for the entire time they existed on the property, with the exception of the one bulldozer which Mr. Conklin drove around the property. Mr. Jackson also verified that all of the equipment was stored on the east side of the garage.

The other item of record which tends to shed light on the use made of the property in 1957 is the 1964 decision of the Board of Appeals. That decision is important in that Mr. Conklin specifically describes his existing equipment as a backhoe, a bulldozer and a low-boy. Mr. Conklin's testimony in the 1964 Board of Appeals case and the present day recollection of Mr. Jackson can only lead to the conclusion that at the time of the first Comprehensive Zoning in 1957, at best, there were two dump trucks, a backhoe, a bulldozer/front-end loader, a backhoe and possibly a low-boy were stored on the property.

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There was further evidence that all of the equipment was parked southeast of the garage and that none of the equipment had been moved, except for the bulldozer, since the late 1940's and that no commercial use was made of any of the equipment.

The storage of these items on the subject property would become non-conforming by virtue of the passage of the 1957 county-wide Zoning Ordinance. Section 13.0115 (a) of the 1957 Zoning Ordinance allows a B-3 zoned property to be used for "Contractor's equipment storage, yard or plant, or storage and rental of equipment commonly used by the contractor." Parking of such equipment in other commercial, residential or agricultural districts was not permitted. Accordingly, the 1957 Comprehensive Rezoning established a non-conforming use on the subject property.

The 1964 Board of Appeals case allowed the construction and use of a proposed utility building "so long as the building is used in a non-commercial manner outlined above." That 'manner' was to use the building to store three pieces of personally used equipment "not for a business use". While the case addressed the types of equipment which were stored on the property, and noted that the equipment was not to be used for business uses, the decision did not legitimize the parking of commercial equipment on the property. It merely granted the approval to construct a utility building to store the "personally used" equipment. Accordingly, the non-conforming status of the property as it existed in 1957 was not changed by the 1964 Board of Appeals decision.

It is, also, important to note that even the testimony of the Applicant, Mr. Kraus, was consistent with that of the neighbors, in that Mr. Kraus stated that when he purchased the property in 1989, he found "one or two dump trucks" stored, and a fair amount of machinery or junk on the property.

In contrast to the historical use made by Mr. Conklin of the subject property, Mr. Kraus' present tenants use not only the existing house as an residence, but also the surrounding property for an active trucking business. Instead of the fairly dense and grown up vegetation which existed on the property when Mr. Conklin owned the property, much of it has now been graded. Instead of the fairly small storage/parking area southeast of the garage used by Mr. Conklin, Dilworth Trucking now uses a fenced site of about 150' x 250' deep for the storage of heavy equipment.

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In determining whether the activity currently taking place on the property is within the allowable non-conforming use, the factors enunciated in McKemy v. Baltimore County, supra, should be examined.

The first factor is whether the “current use reflects the nature and purpose of the non-conforming use”. Clearly, the current use by a active trucking operation with numerous tandem-axel dump trucks, a variety of associated equipment, a large fenced in parking area, and the use of the old garage for its business purposes, greatly exceeds the relatively minor, non-intrusive, and personal use of the property as it was under Mr. Conklin’s ownership.

The second factor to be examined under McKemy is whether the current use is merely a “different manner of utilizing the current non-conforming use or ... a use different in character, nature or kind.” Again, clearly, an old backhoe, an old bulldozer, and two ancient single-axel dump trucks could not in any manner compare to the present use of a substantial portion of the property for a modern-day excavating business.

Further applying McKemy, one needs to next determine if the current use has a “substantially different effect on the neighborhood”. Again, the answer to this query is in the affirmative. The neighbors testimony was that they were not disturbed by Mr. Conklin’s use of the property. Indeed, to their knowledge, Mr. Conklin never started any of the equipment, with the exception of the bulldozer. In contrast, the neighbors are today offended by the significant intrusion of the current activity on the property, including the noise, fumes, and impact on property values.

The last factor of McKemy, whether the “current use (is) a drastic enlargement or extension of the non-conforming use” can again, only be answered in the affirmative. There is little doubt, based on the testimony presented by the witnesses and the other evidence in this case that the current operation is a drastic enlargement of the use Mr. Conklin made of the property.

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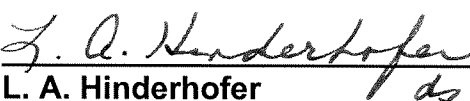
The uses which were allowed as non-conforming were those uses created by Mr. Conklin's storage of personal equipment which he parked on the property. While the present owner of the property could have used the property for that same purpose when he purchased the property in 1989, he elected not to do so. This selection constitutes an abandonment of the non-conforming use established by Mr. Conklin. The current owner substituted and expanded the use which constitutes an illegal expansion on the property. Therefore, the non-conforming use which Mr. Conklin enjoyed based on the use of the property for storage of personal equipment prior to 1957 and the non-conforming use recognized in Board of Appeals Case No. 970 in 1964 has been terminated.

Harford County Code Section 267-20(C) provides:

"In the event a non-conforming use ceases for a period of one year or more, then the non-conforming use shall be deemed abandoned and compliance with this Part I shall be required. The casual, temporary or illegal use of land or structure does not establish the existence of a non-conforming use."

It is the finding of the Hearing Examiner that the non-conforming use established by Mr. Conklin terminated and was abandoned by the present property owner. Therefore, it is the recommendation of the Hearing Examiner that the Zoning Administrator's interpretation contained in the letter of January 16, 1998 should be upheld.

Date APRIL 1, 1999



L. A. Hinderhofer
Zoning Hearing Examiner